

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 10 November 2005

BALCA Case No.: 2004-INA-00348
ETA Case No.: P2002-VA-03384448

In the Matter of:

COMMONWEALTH BUILDING & DESIGN, INC.,
Employer,

on behalf of

JUAN PRETALIA-NOVOA,
Alien.

Appearance: Fredy Lopez
Manassas, Virginia
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman, and Vittone,**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the

Act”), and Title 20, Part 656 of the Code of Federal Regulations.¹ We base our decision on the record upon which the Certifying Officer denied certification and Employer’s request for review, as contained in the appeal file and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On April 18, 2001, Commonwealth Building & Design, Inc. (“Employer”) filed an application for labor certification on behalf of Juan Carlos Pretalia-Novoa (“Alien”) to fill the position of Carpenter. Appeal File (“AF”) at 359. The job duties set forth in Form ETA 750-A included building wood frames for houses, all wood exterior work, installation of doors, window trim, crown molding and rails throughout the entire house, building cabinetry, bookcases and desks, installation of hardwood floors, design of interior trim and using a variety of construction tools. *Id.* The qualifications for the position were a sixth grade education, two years of experience, as well as previous training, the ability to read blueprints and flexible hours. *Id.* The hourly wage for the position was \$16.00. *Id.*

Recruitment efforts yielded two U.S. applicants. AF at 367, 376. Employer indicated that it attempted to contact both applicants by telephone at least twice, but submitted no documentary evidence to note the times and dates of the attempts. AF at 368. There is no record that Employer attempted to contact the applicants by mail, certified or otherwise. Based on the unsuccessful attempts to contact the two U.S. applicants, Employer rejected them. AF at 368.

The Certifying Officer (“CO”) issued a Notice of Findings (“NOF”) on September 9, 2003, indicating that the application for labor certification would be denied.

¹ This application was filed prior to the effective date of the “PERM” regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

AF at 356. Citing 20 C.F.R. § 656.21(b)(6), the CO required Employer to provide documentation that the two U.S. applicants were rejected for lawful job-related reasons. *Id.* The NOF noted that Employer's rejection of the applicants for failure to respond to the attempts to contact them by phone "cannot be regarded as arising from lawful job-related reasons absent evidence that they also failed to respond to an attempt to contact them in writing." *Id.*

In its rebuttal of September 29, 2003, Employer argued that its recruitment efforts were sufficient to justify rejection of the U.S. applicants. AF at 296. It contended that unsuccessful attempts at phone contact and even "no response" statements had been found by the CO to meet the minimum acceptable efforts of recruitment in other applications for labor certification. AF at 296-297.

The CO issued a Final Determination on June 30, 2004 denying labor certification based on Employer's failure to comply with the instruction to provide documentation of its efforts to contact the two U.S. applicants through written correspondence such as certified mail. AF at 294. The Final Determination further stated that Employer's statements that it made efforts to contact the applicants by telephone were unsupported by specific documentation of those efforts. *Id.* The CO concluded that Employer's attempt to justify its recruitment efforts by comparing them to other labor certification applications failed to adequately rebut the findings contained in the NOF. *Id.*

Employer requested administrative review of the CO's Final Determination on August 4, 2004. AF at 1. Review was granted and the Board of Alien Labor Certification Appeals ("Board") docketed the case on August 25, 2004.

DISCUSSION²

The regulations require an employer to establish that there are not sufficient able, willing, qualified and available U.S. workers for the job. 20 C.F.R. § 656.21(b)(6); *National Semiconductor*, 1988-INA-301 (Mar. 3, 1989) (*en banc*). Implicit in the regulations is the requirement for an employer to conduct its post-filing recruitment in good faith. *H.C. LaMarche Enterprises, Inc.*, 1987-INA-607 (Oct.27, 1988). An employer must adequately document its recruitment efforts; mere assertions of recruitment activity are insufficient without supporting documentation. *Patterson Board of Education*, 1988-INA-88 (April 21, 1988).

Here, the NOF advised Employer of the CO's intent to deny certification unless Employer submitted specific documentation to 1) support its claims that it attempted to contact the U.S. applicants by phone, or 2) to demonstrate that it had attempted to contact the applicants by other means, such as certified mail. All findings in the NOF which are not rebutted are deemed admitted. *D.C. National Cab Co., Inc.*, 1989-INA-294 (May 22, 1991). Because Employer did not supply any additional documentation of its recruitment efforts, we adopt the CO's finding that it failed to demonstrate that it had made a good faith effort to recruit U.S. workers.

Employer's contention that its asserted efforts met the minimal standards for good-faith recruitment is also unconvincing, relying as it does on prior grants of labor certification. As the appellate Board in this case, we are not bound by the CO's ruling in a difference case. *V/H General Electrical Maintenance*, 2002-INA-215 (Sept. 30 2003). Employer's application for labor certification was properly denied.

² Along with its request for review, Employer submitted additional documentation. Those documents will not be considered as this Board's review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. §§ 656.27(c), 656.26(b)(4). Thus, evidence submitted with the request for review will not be considered by the Board. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*).

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.